IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. CANNON	:	**CIVIL ACTION**
	:	
v.	:	
	:	
MONTGOMERY COUNTY, PA, et al.	:	**NO. 96-CV-7405**

M E M O R A N D U M

WALDMAN, J. **June 29, 1998**

I. Background

In this 42 U.S.C. § 1983 action, plaintiff asserts claims arising from his arrest by the Montgomery County Sheriff's Department on February 13, 1996 for nonpayment of child/spousal support obligations.

Presently before the court is defendants' motion for summary judgment on two of the remaining three Counts of plaintiff's complaint.

The first is Count I in which plaintiff alleges that he was maliciously prosecuted and falsely arrested and imprisoned because of a custom and practice of the municipal defendant which is therefore liable. The alleged custom and practice is to "hastily select ad-hoc groups of allegedly support-delinquent fathers based upon information which was false, historically unreliable, mistaken, and/or incomplete, and then aggressively arresting and incarcerating them as a group, in order to achieve maximum publicity and exposure."

The other is Count V in which there is a remaining § 1983 claim for malicious prosecution, false arrest and false imprisonment against defendant Loughnane.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986); Arnold-Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248. A dispute over a material fact is "genuine" only if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." Id.

All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256. Although the movant has the initial burden of demonstrating an absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531

(3d Cir. 1990), cert. denied, 499 U.S. 921 (1991)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

III. Statement of Facts

From the evidence of record as uncontroverted or viewed most favorably to plaintiff, the pertinent facts are as follow.

Following divorce proceedings which were initiated in February 1989, plaintiff and his former wife entered into an Agreed Order of Support which required plaintiff to pay alimony and child support. The Order provided that plaintiff would pay $75 per week in alimony until December 31, 1994, his wife's remarriage or cohabitation or the death of either party, whichever first occurs, and $150 dollars per week in child support. The order was signed by the presiding Montgomery County Common Pleas Judge.

The Montgomery County Domestic Relations Division ("DRD") is responsible for administering the collection and distribution of spousal and child support pursuant to orders issued by the Common Pleas Court. DRD utilizes a thirty-day arrear computer system which indicates when an individual has not met his support obligations. A list of "control dates" is maintained by the DRD. The list is checked each day and, if appropriate, changes are made with respect to a particular case. When parties wish to terminate an order, they must initiate proceedings to do so. The DRD also maintains a manila file for

each support case, however, all of the correspondence and information in that file is not necessarily recorded on the computer entry for each case. Geza Nagy is the Director of DRD and administers the Child Support Program for the Common Pleas Court.

Mr. Cannon complied with the Order of Support and was never in arrears. His daughter Julie turned 18 in 1994. As of December 1994, the DRD case records indicated that plaintiff had a surplus in his support account.

In March of 1995, plaintiff received a Petition for Contempt from the DRD, which informed him that he was in arrears in the amount of $2,452.50. Plaintiff was directed to appear for a hearing on April 11, 1995. Mr. Cannon's attorney subsequently filed a Petition to Vacate the support order in which he stated that the parties' minor child had reached the age of majority in 1994. Mrs. Cannon sent DRD a letter canceling this contempt hearing which was received by DRD on April 11, 1995.

Mrs. Cannon later filed a petition for college tuition support on behalf of her daughter. A hearing was scheduled on this matter for June 28, 1995 and then postponed to October 12, 1995. A hearing was scheduled on Mr. Cannon's Petition to Vacate for June 27, 1995, but it was postponed as well and not rescheduled.

The October 12, 1995 hearing on the issue of child support payments while Julie Cannon was in college was canceled by the DRD and was rescheduled for January 1996. Because of a change in Pennsylvania law, Mrs. Cannon realized that she was not entitled to the relief she sought. Mrs. Cannon's petition was removed from the case file in April 1996.

Defendant Kevin Loughnane is an enforcement officer for the DRD. On January 2, 1996, the DRD issued a second Petition for Contempt against plaintiff. This petition, which was signed by defendant Loughnane alleged that Mr. Cannon was in arrears in the amount of $8,602.50 on his support payments. Also on January 2, 1996, an Order went out from DRD signed by Geza Nagy stating that a hearing would be held on January 24, 1996.

With a cover letter of January 2, 1996, the DRD sent a copy of the petition and order to appear for a hearing to Mark Dischell, plaintiff's attorney of record in that matter. Plaintiff was advised by his attorney that he would "work it out" with Mrs. Cannon's attorney to have the hearing canceled. Plaintiff submits a copy of a telefax from Toby Dickman, Mrs. Cannon's attorney, to DRD Scheduling Coordinator Jennifer Tornetta, informing her that the hearing should be canceled. It is uncontroverted, however, that Mr. Loughnane never saw this telefax and that it has never been present in the DRD file. Plaintiff submits no affidavit from Ms. Dickman or other

competent evidence to show the original of such a telefax was ever sent. On January 24, neither party appeared for the hearing, believing that it had been canceled at the behest of Ms. Dickman. If the Sheriff or DRD had been timely advised that the hearing was canceled, plaintiff would not have been arrested.

Officer Loughnane swore out a Request for a Bench Warrant which asserted that Mr. Cannon was now in arrears in the Amount of $9,205.50 and that he had failed to appear for the January 24th hearing. The copy of this Request in the record before the court is dated February 2, 1996.

Officer Loughnane did not read the Order of Support present in the Cannon divorce/support file before filling out the Request for a Bench Warrant. He checked the DRD computer system to determine plaintiff's arrearage. To obtain all information about a case, an officer would need to review the computer records and paper file.

When a hearing is scheduled and a defendant does not appear, Mr. Loughnane first checks the postal verification to determine that DRD has a good address for the defendant. He then looks on the computer system to determine what the arrears are. An informal request for a bench warrant is then sent to the Enforcement Coordinator who types the supporting affidavit and warrant and then sends the documents back to Officer Loughnane.

He then looks at the bench warrant to verify the amount in arrears and that there was a scheduled hearing for which the defendant failed to appear. When swearing out the affidavit, Officer Loughnane generally checks the computer system and the paper file to determine if there has been any activity.

Officer Loughnane did check the DRD computer system and printout which showed that as of January 29, 1996 Mr. Cannon owed $1,245 in alimony and $7,957 in support, the amounts indicated in the Request for Bench Warrant.

Nothing in the computer records indicated that Julie Cannon had turned 18. Had Mr. Loughnane seen information in the file indicating that she had turned 18 in 1994, he would have recognized that plaintiff did not owe support for 1995 and 1996. Mr. Loughnane does not recall seeing Mr. Cannon's Petition to Vacate in the file. If he had, he would have asked his supervisor if the petition had been resolved by the court. In the instant case, the answer would have been no.

Officer Loughnane was never advised by anyone that the parties had agreed to a cancellation of the scheduled hearing. The testimony of Sergeant Gertenitch that even with "no arrearages" plaintiff would still be subject to arrest for "failure to appear for the [January 24th] hearing" is uncontroverted.

Judge Marjorie Lawrence issued a Bench Warrant for plaintiff's arrest. A copy provided to the court bears a

typewritten date of January 30, 1996 at the top. As noted, the contents are pre-typed by a DRD secretary. No date appears in the Judge's handwriting. The official docket shows that the bench warrant was issued on February 7, 1996, and there is no proof that Judge Lawrence would or did execute a warrant without a supporting affidavit.

The warrant was served shortly before midnight on February 13, 1996 by Montgomery County Sheriff's Deputies, led by defendant Sergeant Joseph Gertenitch. The arresting officers refused plaintiff's request to see the warrant, to tell him why he was being arrested or to allow him to telephone his lawyer. Plaintiff's request that Sheriff Lalley be called so plaintiff could discuss the appropriateness of his arrest with the Sheriff was also refused.

Shortly after midnight on February 14, 1996, Mr. Cannon was placed in a jail cell adjacent to the Montgomery County Courthouse. At 3:45 a.m., plaintiff informed the guard on duty that he was a diabetic and that he would require an insulin shot by 6:00 a.m. The guard informed plaintiff that he would have to wait until the guard's supervisor reported for work at 6:00 a.m.

At 6:00 a.m. plaintiff informed the deputy on duty that he required an insulin injection, that he had two heart attacks in the last 16 months and required his medication immediately, but to no avail.[1] Plaintiff was placed in a cell with 70

[1] Plaintiff has also asserted a claim for deliberate (continued...)

individuals. It had seating for only 30. As a result, plaintiff had to stand in the cell from 5:30 a.m. to 9:45 a.m.

Plaintiff was taken into a smaller cell at 9:45 a.m. where he spoke with Domestic Relations Enforcement Officer Antonio Paciello. Officer Paciello had interview duties which required him to gather basic information about the defendants, including address, verification of Social Security numbers and assets and financial condition.

Plaintiff attempted to explain to Officer Paciello the circumstances leading up to his arrest but was told not to speak. Officer Paciello refused plaintiff's request to contact his attorney or his former wife's attorney to attempt to clarify the issues surrounding his arrest. Plaintiff was returned to his original cell and advised that a court hearing was scheduled on his case for 1:30 p.m.

A half hour after being returned to the holding cell, plaintiff was allowed to use the telephone. He contacted his business partners and requested that they bring him his insulin and contact his attorney. Plaintiff's partners arrived at 11:00 a.m., at which time plaintiff was allowed to self-administer an insulin shot. Plaintiff's attorney, Joseph McGrory, arrived at 11:30 a.m.

(...continued)
indifference to a serious medical condition which is not a subject of the instant motion.

A hearing was held on plaintiff's case at 1:30 p.m. before the Honorable Maurino J. Rossanese. Mr. McGrory explained to the Judge that an error had occurred. Judge Rossanese examined plaintiff's DRD file. He read the letter from Melanie Cannon from April 1995 which stated that Julie Cannon had turned 18 and that the April 11th hearing should be canceled, but that Mrs. Cannon wanted college support. Mr. McGrory told the Judge that a letter had been sent to DRD by Mrs. Cannon's attorney canceling the January 24, 1996 hearing. Judge Rossanese noted that such a letter was not in the DRD file. Officer Paciello noted at the hearing that he did not have plaintiff's file in his possession prior to the hearing. The Judge ordered the bench warrant be withdrawn and directed plaintiff's counsel to meet with the DRD to straighten out the support matter. Judge Rossanese directed that there be no public announcement of the proceedings against plaintiff.

Plaintiff was then returned to the holding cell where an unidentified Sheriff's Deputy refused to release him since the Judge's order did not specifically direct his release. Mr. McGrory returned to the courtroom and obtained a specific order for plaintiff's release. Plaintiff was released at 2:30 p.m.

Plaintiff's name was included among those disclosed by Sheriff's Department to the press regarding a roundup of men who did not pay their support obligations, known as "deadbeat dads." Plaintiff's arrest was part of a Valentine's day roundup of 31 such individuals, and was designed to obtain maximum publicity

about efforts to pursue fathers who do not meet their support obligations. Of the 31 arrestees, one in addition to plaintiff has asserted a claim of false arrest.[2]

Plaintiff received in the mail a "Final Notice Before Arrest" which was dated February 14, 1996, and signed by Sergeant Gertenitch. The Notice informed plaintiff that a warrant had been issued for his arrest and that he could resolve the matter by reporting to the Warrant Division of the Montgomery County Sheriff's Department within 48 hours.[3]

IV. Discussion

A § 1983 malicious prosecution claim must be predicated on the Fourth Amendment. See Albright v. Oliver, 510 U.S. 266, 270 n.4, 274-75 (1994). To maintain a § 1983 malicious prosecution claim under the Fourth Amendment, there must be a seizure or deprivation of liberty effected pursuant to legal process. Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (3d Cir. 1995). This requirement is satisfied by plaintiff's arrest pursuant to a bench warrant.

A plaintiff must then prove the elements of the common law tort of malicious prosecution, i.e., "(1) the defendants

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[2] That individual claims that as a result of a clerical error he was arrested for failure to appear at a hearing at which he did in fact appear.

[3] Plaintiff states in his brief that he was denied an opportunity to "self-surrender" but does not suggest someone named in a warrant has a right to self-surrender or that the opportunity to do so has any bearing on the existence of probable cause for an arrest.

initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and, (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996). Malice may be inferred from the absence of probable cause. See Lippay v. Christos, 996 F.2d 1490, 1502 (3d Cir. 1993); Lohman v. Township of Oxford, 816 F. Supp. 1025, 1031 (E.D. Pa. 1993).

A law enforcement officer may be liable for malicious prosecution only if he conceals exculpatory evidence from or provides false or misleading information to the charging authority or in some other manner interferes with the ability of that individual to exercise independent judgment regarding the guilt or innocence of the accused. See Sanders v. English, 950 F.2d 1152, 1162-1164 (5th Cir. 1992); Robinson v. Maruffi, 895 F.2d 649, 655 (10th Cir. 1990); Kim v. Gant, 1997 WL 535138, *4-5 (E.D. Pa. Aug. 15, 1997); Torres v. McLaughlin, 966 F. Supp. 1353, 1365 (E.D. Pa. 1997); Rhodes v. Smithers, 939 F. Supp. 1256, 1273-1274 (S.D. W. Va. 1995).

Similarly, if plaintiff's arrest was based on probable cause, he cannot sustain a § 1983 false arrest claim. See Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir.1988) ("The proper inquiry in a Section 1983 claim based on false arrest or misuse of the criminal process is ... whether the arresting officers had probable cause to believe the person arrested had committed the offense"); Smith v. Borough of

Pottstown, 1997 WL 381778, at *11 (E.D. Pa. June 30, 1997) (plaintiff cannot maintain a § 1983 false arrest claim where police officers had probable cause to arrest him).

When an officer makes an arrest without probable cause, the arrestee may also assert a § 1983 false imprisonment claim based on any subsequent detention resulting from that arrest. Groman v. City of Manalapan, 47 F.3d 628, 636 (3d Cir. 1995). "A false imprisonment claim under § 1983 which is based on an arrest made without probable cause is grounded in the Fourth Amendment's guarantee against unreasonable seizures." Id.

Thus, as all parties acknowledge, the viability of the § 1983 claims at issue turns on whether a reasonable jury could find from the competent evidence of record that there was not probable cause to arrest plaintiff.

Probable cause exists where the totality of facts and circumstances are sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense. Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d Cir. 1997); Pansy v. Preate, 870 F. Supp. 612, 618 (M.D. Pa. 1994), aff'd, 61 F.3d 896 (3d Cir. 1995). An officer who has probable cause to arrest is not required to conduct further investigation for exculpatory evidence or to pursue the possibility the suspected offender is innocent. See Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th Cir.), cert. denied, 117 S. Ct. 179 (1996); Simkunas v. Tardi, 930 F.2d 1287, 1292 (7th Cir. 1991); Kompare v. Stein, 801 F.2d 883, 890 (7th Cir. 1986).

Defendants contend that there is no material issue of fact as to whether Officer Loughnane had probable cause to seek a warrant for plaintiff's arrest. It is uncontroverted that Officer Loughnane knew a hearing was scheduled for January 24, 1996, knew that plaintiff did not appear and had no knowledge of any request or attempt to cancel the hearing.

Plaintiff points to the existence of documents in the DRD file which indicate that in December 1994 plaintiff had a surplus of $592.50 in his support account, that plaintiff was seeking to vacate the support order and that Julie Cannon had turned 18 in December 1994. Plaintiff also argues that the terms of the Support Order show it expired in December of 1994. Contrary to plaintiff's assertion, the Support Order does not state that support payments for Julie Cannon are to terminate in December 1994. The Order refers to her as a "minor child" but does not specify an age or date at which all obligations would cease.

These materials, however, do not negate the fact that Officer Loughnane had tangible evidence plaintiff was in arrears and, more importantly, had not appeared for a scheduled hearing.

Plaintiff argues that his failure to appear for the hearing did not support his arrest in view of the deposition testimony of Officer Paciello that it is DRD "policy that if none of the parties show up, a hearing is not considered to have been held." The biggest problem with this argument is that Officer Paciello did not make this statement. In the context of

describing the entire support hearing process, he merely stated as an obvious fact that "[i]f neither party appears there is no hearing." That a hearing could not be conducted would hardly in itself excuse the failure of an alleged delinquent obligor to appear and Officer Paciello says nothing to the contrary or anything about "DRD policy."

One cannot reasonably find on the record presented that Officer Loughnane lacked probable cause to believe plaintiff had failed to appear for a scheduled hearing. While this obviates the need to resolve Mr. Loughnane's claim of qualified immunity, the court notes that a reasonable enforcement officer clearly could have believed that there was probable cause for plaintiff's arrest in light of clearly established law and the information known to Mr. Loughnane. See Anderson v. Creighton, 483 U.S. 635, 641 (1987) (officer who reasonably but mistakenly violates a plaintiff's constitutional right is immune from liability); Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997). See also Hunter v. Bryant, 502 U.S. 224, 229 (1991) (The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law").

It follows that a municipal policy, practice or custom could not have caused a constitutional violation when none occurred. Moreover, even if probable cause were absent in the instant case, one could not reasonably find from the evidence presented that the municipal defendant through Sheriff Lalley,

Director Nagy or any other responsible decisionmaker was deliberately indifferent to the constitutional rights of its citizens or had any policy, practice of custom which prompted the false arrest, prosecution or imprisonment of persons in the county. See City of Canton v. Harris, 489 U.S. 378, 388 (1989); City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985); Monnell v. Department of Social Services, 436 U.S. 658, 694 (1978); Beck v. City of Pittsburgh, 89 F.3d 966, 971-72 (3d Cir. 1996).

The packaging and publicizing of arrests for deterrent effect is not unusual, unconstitutional or in and of itself likely to result in false arrests. An arrest is lawful if it is supported by probable cause however it may be publicized. An arrest made without probable cause is not salvaged however discreetly it may have been effected. There is no evidence of any history of DRD computer error or of prior false arrests. See Arizona v. Evans, 115 S. Ct. 1185, 1194 (1995) (noting reasonableness of reliance upon police computer record in making arrest in the absence of any history of inaccuracy leading to false arrests).

There is evidence that Sheriff Lalley did have a policy or condone a practice of not permitting telephone calls by defendants at the time of arrest. There is, however, no constitutional right to make a telephone call upon arrest or completion of booking. See Harrill v. Blount County, 55 F.3d 1123, 1125 (6th Cir. 1995) (right to make telephone call upon

arrest is not property right or liberty interest recognized by federal law); State Bank of St. Charles v. Camic, 712 F.2d 1140, 1145 n.2 (7th Cir.) ("There is no constitutional requirement that a phone call be permitted upon completion of booking."), cert. denied, 464 U.S. 995 (1985). Plaintiff was permitted to contact an attorney prior to his court appearance and, indeed, the attorney was successful in extricating plaintiff from his predicament.

Accordingly, defendants Loughnane and Montgomery County are entitled to summary judgment on the remaining claims asserted against them in Counts I and V. Thus, defendants motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of June, 1998, upon consideration of defendants' Motion for Partial Summary Judgment (Doc. #13) and plaintiff's response thereto, following an opportunity for oral argument and consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly, **JUDGMENT is ENTERED** in the above action for remaining defendants Loughnane and Montgomery County on the claims asserted in Counts I and V of plaintiff's complaint.

BY THE COURT:

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JAY C. WALDMAN, J.